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in the

Supreme Court

of the

United States

OCTOBER TERM 1980

JOHN P. OHL,

Petitioner

vs.

LILLIAN M. OHL,

Respondent

On Petition for Writ of Certiorari
to the Fourth District Court of Appeals
of Florida

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS

1. SHOULD CERTIORARI BE GRANTED WHERE THE RESPONDENT (WIFE) WAS GRANTED A SPECIAL EQUITY IN REAL PROPERTY AND JOINT OWNERSHIP OF PERSONAL PROPERTY ALLEGEDLY TITLED IN THE NAME OF THE PETITIONER (HUSBAND) AND SITUATED IN NEW YORK, A STATE FROM WHICH BOTH PARTIES HAD REMOVED THEIR RESIDENCE, WHEN BOTH PARTIES HAD SUBMITTED THEMSELVES TO THE JURISDICTION OF AND SOUGHT AFFIRMATIVE RELIEF IN THE FLORIDA COURTS AND WHERE THE PETITIONER (HUSBAND) FAILED PROPERLY TO RAISE IN THE STATE COURTS THE FEDERAL CONSTITUTIONAL ISSUE UPON WHICH HE RELIES FOR JURISDICTION?

2. WHERE PETITIONER (HUSBAND) HAD FAILED TO DEMONSTRATE THE ABSENCE OF ADEQUATE STATE GROUNDS UPON WHICH A DECISION AWARDING ATTORNEYS' FEES TO THE RESPONDENT (WIFE) WAS MADE, MAY HE OBTAIN REVIEW OF THE AWARD BY THIS COURT?

3. MAY PETITIONER (HUSBAND) OBTAIN REVIEW BY THIS COURT OF A TRIAL COURT RULING ADMITTING INTO EVIDENCE DOCUMENTS WHICH WERE STORED IN THE MARITAL HOME ACCESSIBLE TO THE WIFE AND CHILDREN BUT ALLEGEDLY "STOLEN" FROM HIM, EVEN THOUGH HE MADE NO PROPER OBJECTION TO THEIR ADMISSIBILITY AT THE TIME OF TRIAL?

4. SHOULD THE UNITED STATES SUPREME COURT GRANT CERTIORARI WHERE A JUDGMENT OF DISSOLUTION OF MARRIAGE DOES NOT B ITS OWN TERMS RULE UPON ANY FEDERAL QUESTION, WHERE THE JUDGMENT IS AFFIRMED WITHOUT OPINION BY THE FLORIDA DISTRICT COURT OF APPEAL AND WHERE THE FLORIDA SUPREME COURT FINDS ITSELF WITHOUT JURISDICTION TO REVIEW THE JUDGMENT?

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FLORIDA PROCEDURAL RULES

Appellant cites Rules 1.110(d) and 1.140(h), Florida Rules of Civil Procedure. They are reproduced in an Appendix at the back of the volume.

STATEMENT OF THE CASE

The Petitioner (Husband) and Respondent (Wife) were married in 1932 and lived in New York City while the Husband completed his studies at Columbia University Law School, and for approximately one year thereafter, at which time he accepted an appointment to go to Washington, D.C. where he was engaged in the drafting of the Internal Revenue Code of 1934. Upon completion of that assignment the parties returned to and lived in the New York area, except for a time during World War II. In 1950 the marital residence at Sands Point, Long Island, New York, was purchased and title taken by him in Husband's name "for tax reasons", even though the Wife and her family had made specific monetary contributions from sources outside the marriage to the previous marital residence and to the Sands Point property itself.

Approximately three (3) years prior to the trial, the Wife acquired a three-bedroom, two-bath home in the Cayman Islands and commenced spending part of each winter in that location. The parties and their daughter, KERIN, were partners in a ranch in Wyoming and the Wife spent a portion of each summer at the ranch. She continued to stay in the marital home and continued to use it freely as her own up until the actual

trial of this case. The Husband continued to carry the expenses of the marital home at Sands Point up until the time of trial and to that extent did provide the Wife with a degree of support. The Sands Point house was a large mansion situated upon approximately ten acres and required three to four full time staff members.

The evidence showed that the Wife had an after-tax net worth of approximately $1,000,000, whereas the Husband's after-tax net worth was in excess of $1,400,000, plus the value of his beneficial interest in a certain trust situated in Bermuda, the magnitude of which was totally undisclosed at trial.

The evidence was that at the time of trial the Wife's annual income was estimated at $78,000 before taxes, whereas the cash available to the Husband during the year prior to trial, for investment and living expenses, amounted to $222,000. Though the Husband had retired from active participation in his New York law firm, he had still earned legal fees in excess of $100,000, plus pension benefits being paid to him by the law firm at an annual rate of $67,000, plus income from securities, director's fees, trustee's fees, and tax benefits from partnership investments.

The Wife concededly purchased a group of items of personal property with her own separate funds. As to the balance of the personal property contained in the inventory of the Sands Point residence, the Court found that it was jointly owned. The Husband claims in his Petition that the Wife acknowledged she had not contributed any monies toward the purchase of those items. That contention was disputed. There is another

very definite distinction to be drawn, in that essentially all of the Wife's funds originated from sources outside the marriage. The Husband on the other hand was and is a very successful tax lawyer, investor and businessman, and had virtually no funds other than those acquired from those endeavors during the course of the marriage. The Wife, under Florida law, is considered to have made a contribution toward the accumulation of those funds by virtue of staying home, raising the children, taking care of the home, entertaining clients, maintaining a social standing in the community and all of those things which contribute to the enhancement of the ability of the other spouse to earn money and achieve financial progress. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980) at 1203 and 1204.

Certain documents having reference to the administration of the Respondent's father's estate, the title transactions with respect to the Sands Point house, and the previous marital residence of the parties were received into evidence over the contention of the Petitioner that they were "stolen" documents. These documents were stored in the marital home accessible not only to the Husband but also the Wife and children of the parties. No constitutional objection was made to the receipt of those documents into evidence in the Petitioner's Motion in Limine (2a) directed to the admissibility of those documents, and such objection as was made at trial was not on any legally sufficient ground. (10 & 11a) There is no question the documents were discoverable and were otherwise competent and relevant evidence.

ARGUMENT

(1) The Petitioner relies heavily upon the California case of *In Re: Marriage of Roesch*, 83 Cal.App.3d 96, 147 Cal.Rptr. 586, (1st Dist. 1978) and upon the New York case of *Scheurer v. Scheurer*, 308 N.Y. 447, 126 N.E.2d 555 (1955). In the *Roesch* case the California court held that California's quasi-community property law could constitutionally be applied to out-of-state property in cases where both parties, having previously been domiciled in another state, had changed their domicile to California and, subsequent to the change of domicile, the spouses sought in a California court legal alteration of their marital status. In that case the parties had previously resided in Pennsylvania where the husband acquired an interest in a parcel of real estate in his name alone. The husband then moved to California where he brought suit for divorce. The wife and minor child of the parties, remained in Pennsylvania. The court held that under those facts the interest of California in the marital property was minimal, whereas that of Pennsylvania was substantial and that the wife was entitled to protection of the laws of Pennsylvania.

In this case the wife, of course, did not remain a resident of New York and in addition to that she, along with her husband, sought affirmative relief with reference to the marriage in the courts of Florida. It makes little difference, and certainly would add nothing to the constitutional validity of the Petitioner's claims here, whether or not the wife established residence in Florida, in Wyoming or in the Cayman Islands. The key factors are that she is no longer a resident of New York and that she did seek affirmative relief in the courts of

Florida, thereby submitting herself to the jurisdiction of the Florida courts and making herself amenable to the jurisprudence of the State of Florida which holds that one spouse may acquire a special equity in property acquired and titled in the name of the other spouse provided there is evidence the first spouse contributed to the acquisition of the property from sources outside the marriage. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980), *Duncan v. Duncan*, 379 So.2d 949 (Fla. 1980).

The Petitioner relied upon the New York case of *Scheurer v. Scheurer, supra*, to support his contention that any rights the wife had to the New York property titled in his name were barred. In that case the Plaintiff/Wife sought to impress a constructive trust in her favor on a house purchased by the husband in his own name claiming that it was paid for in part with her money. This was denied and the husband pled as defenses the Statute of Frauds and the Statute of Limitations. The Court of Appeals held that the claim was barred by the Statute of Limitations and the running of the statute was not tolled merely because the parties were husband and wife.

Under Florida law the Statute of Limitations is an affirmative defense, Fla.R.Civ.Proc. 1.110(d), and if not pled and proved is waived. Fla.R.Civ.Proc. 1.140(h). The Petitioner in this case neither pled the Statute of Limitations, nor proved at the trial that the Respondent had no right of action under New York law. Neither did the Respondent argue in his briefs to the trial court that he would be denied due process or equal protection of the law under the United States Constitution in the event the relief Petitioner sought was granted to her.

The Respondent in her Counterclaim, by her evidence at trial, and in her post trial briefs always sought a special equity in the New York real estate and a share of the personal property which was acquired by the parties during the course of the marriage for use in the marital home. It was incumbent upon Petitioner to make his defenses and his objections based on New York law and based upon any alleged constitutional grounds in the trial court and not for the first time in the appellate courts. *Herndon v. State of Georgia*, 295 U.S. 441, 443, (1935) reh. denied 296 U.S. 661 (1935).

(2) The Petitioner makes no assault upon the Florida Statute providing for the award of attorneys' fees and concedes that the statute of Florida is gender neutral, unlike the statutes which are construed in the cases cited in his brief. He argues that since the Florida trial court found the wife had no "need" for the purpose of an award of alimony, that meant that she was not entitled to her attorneys' fees either. The terms of the statute clearly give the trial court discretion mandating only that it consider "the financial resources of both parties" and that the amount for attorneys' fees and suit money be "reasonable". The evidence in the instant case would have supported a finding that the net worth of the Petitioner was significantly greater than the net worth of the Respondent, although the trial court made no finding of fact as to the relative net worths of the parties. In addition, the award clearly was supported by the evidence of the relative incomes of the parties, a purely factual determination, and totally unrelated to considerations of sex.

(3) Contained in the appendix to this brief are pages from the transcript of the trial along with a

portion of the Motion in Limine filed by the Petitioner in advance of the trial. From the transcript it can readily be seen that in some instances the documents were admitted without objection. (8a, 9a & 12a) With respect to Respondent's Exhibit No. 23 the Petitioner grounded his objection on the Florida Supreme Court case of *Markham v. Markham*, 272 So.2d 813 (Fla. 1973), a wiretap case decided on the basis of Florida Statute 934.01(4) and the Florida Constitution. A careful review of the Florida Supreme Court decision in the *Markham* case and of the decision of the Florida District Court of Appeal, First District, at 265 So.2d 59 (Fla. 1st DCA 1972), reveal no reference to, nor reliance upon, the United States Constitution. Both decisions are grounded entirely upon Florida law and, in fact, the District Court of Appeal cited the case of *Katz v. United States*, 389 U.S. 347 (1967), for the proposition:

> " . . . but the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and his very life, left largely to the law of the individual states."

The Respondent's objection, grounded upon the *Markham* case, was that the evidence was a result or product of a wrongful act of the Respondent. The trial court never made the determination, which would initially have been a factual determination to be made by the trial court, as to whether the subject document was indeed a product of a wrongful act of the Respondent, since the trial court ruled that the *Markham* case was not applicable to the facts in the present case. The *Markham* case involved the question of whether wiretap

evidence offered by a husband from a tap of his own telephone line should be admissible against the Wife. The Florida statute prohibited wiretapping but did not make any exception for husbands tapping their own lines. In the present case there was no statute, and the attention of the trial court was not directed to any provision of the United States Constitution, nor was that of the District Court of Appeal, until the filing of the Petition for Rehearing, and then only by virtue of a footnote reference to *Mapp v. Ohio*, 367 U.S. 643 (1961).

(4) A review of Petitioner's Petition for Writ of Certiorari and Appendix thereto clearly shows the following facts:

(1) No ruling was made upon any Federal question in the trial court's Final Judgment of Dissolution of Marriage, nor in that court's Order Assessing Attorneys' Fees and Costs;

(2) The Judgment and Order of the trial court were affirmed without opinion by the Fourth District Court of Appeal of Florida;

(3) Petitioner fails to show that he presented any Federal Constitutional issues to the District Court of Appeal prior to his Petition for Rehearing;

(4) No Federal issues were expressly decided by the Florida District Court of Appeal; and

(5) The Florida Supreme Court expressly found itself without jurisdiction to entertain Petitioner's Petition inasmuch as the Fourth District Court of Appeal of Florida had written no opinion.

It is well settled that the burden is on the Petitioner to establish the jurisdiction of the United States Supreme Court in his Petition for Writ of Certiorari. *Durley v. Mayo*, 351 U.S. 277 (1956), reh. denied 352 U.S. 859(1957). The rule of law has been aptly stated in *Mellon v. O'Neil*, 275 U.S. 212 (1927):

> "It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Whitney v. California*, 274 U.S. 357; and cases cited. It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature (citations)."

This court has considered the question of acquiring jurisdiction in the absence of written opinions by the state courts on several occasions in the past. For instance in *Cuyahoga River Power Company v. Northern Realty Company*, 244 U.S. 300 (1917), the trial court refused to condemn a certain tract of land. Appeal was taken to the Ohio Court of Appeals which affirmed without opinion. The Ohio Supreme Court refused to accept jurisdiction. A writ of error was requested to the Ohio Court of Appeals. The Supreme Court refused to accept jurisdiction because:

> "from an absence of an opinion expressed by the court below it is impossible to say whether

its judgment was rested upon state questions adequate to sustain it independent of the federal questions, or upon such federal questions, both being in the case." 244 U.S. at 304.

Another case involving the lack of a written opinion was *Durley v. Mayo, supra.* In that case Petitioner's Application for Writ of Certiorari was granted but the case was later dismissed where the State of Florida presented evidence that the opinion rested upon State grounds. The Supreme Court stated:

> "In the face of these expressions of the law of Florida, petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below. 'Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment.' *Stembridge v. State of Georgia*, 343 U.S. 541, 547, 72 S.Ct. 834, 837, 96 L.Ed. 1130.
>
> " 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause . . .' " 351 U.S. at 281.

The "barrenness of the record" was cited as the reason for declining to exercise jurisdiction in *DeBacker v. Brainard*, 396 U.S. 28 (1969). In that case Petitioner, a juvenile, claimed that due process was denied him when a Nebraska prosecutor exercised his unreviewable discretion to proceed against this juvenile in ordinary criminal proceedings, rather than in Juvenile Court. In that case the record shows that Petitioner did not make this due process contention before the Juvenile Court Judge. He raised this in a habeas corpus petition but it was not passed upon by the Nebraska District Court. Petitioner failed to press this issue in his appeal to the Nebraska Supreme Court and made only passing reference to it in his brief to that court. Finally, the opinions of the Nebraska Supreme Court did not pass upon the issue nor even refer to it.

In Petitioner's Petition for Rehearing addressed to the Fourth District Court of Appeal of Florida, Petitioner made mention of several "constitutional" issues relating to the Judgment of Dissolution of Marriage entered by the trial court. This was not enough to raise a federal constitutional issue before that court, however, in light of the Supreme Court's holding in *Hiawassee River Power Company v. Carolina-Tennessee Power Company*, 252 U.S. 341 (1920). In that case reference to the "Bill of Rights and the Constitution" was presumed to refer to the State Constitution rather than to the Federal Constitution. Of further significance in the *Hiawassee* case is the fact that the Fourteenth Amendment was actually mentioned in the trial court, although no ruling was made upon it. Furthermore,

> "the long established general rule is that the attempt to raise a federal question after judgment upon a Petition for Rehearing, comes too late, unless the court actually entertains the question and decides it." *Herndon v. State of Georgia*, 295 U.S. 441, 443 (1935), reh. denied 296 U.S. 661(1935).

The *Herndon* case, supra, also points up the fact that the Supreme Court will take cognizance of State procedural rules regarding preservation of points for appeal. In that case there was a preliminary constitutional attack upon the indictment in the trial court; however, this attack was not preserved by exceptions, nor was it assigned as error in due time as the state rules of practice required. Therefore, the Georgia Supreme Court declined to rule on any of these issues, and the U.S. Supreme Court deemed this determination of the Georgia Supreme Court to be conclusive.

Petitioner places a great deal of reliance upon the recent case of *Orr v. Orr*, 440 U.S. 268 (1979), which declared unconstitutional the Alabama Statutes providing that husbands but not wives may be required to pay alimony upon divorce. In that case the Supreme Court exercised its certiorari jurisdiction even though no federal constitutional question was ever raised before or at the time of the divorce decree; however, the husband did manage to raise the constitutional question in the trial court when his wife attempted to seek a contempt citation against him. Furthermore, since no one ever objected to its untimeliness, and since both the trial and the appellate courts decided this issue on the merits, the Supreme Court was able to take certiorari

jurisdiction. Furthermore, the husband in that case relied solely upon the federal constitutional claim in his appeal. It should also be remembered that in the instant case Petitioner is not objecting to the Florida Dissolution of Marriage statute per se but merely to the trial court's application of said statute.

Even if Petitioner had properly presented a federal question to the courts of the State of Florida, the Supreme Court still should not exercise its certiorari jurisdiction in this case. This is because the decision in this case was made entirely in accordance with the Florida Dissolution of Marriage statutes applied in accordance with the provisions of the Florida Constitution.

> "If the judgment below rested on an independent and adequate state ground, the Writ of Certiorari should be dismissed as improvidently granted, *Wilson v. Loew's, Incorporated*, 355 U.S. 597 (1958), for our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights and our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws our review could amount to nothing more than an advisory opinion." *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 566 (1977).

CONCLUSION

In light of the foregoing, it is respectfully submitted that Petitioner has failed to carry his burden of establishing the Certiorari jurisdiction of the Supreme Court. His record does not show that any federal question was ever properly presented in the courts of the State of Florida. It does not show that any state court ever decided, or even considered, any question of a federal nature. Finally, it fails to demonstrate that such a decision was essential to the determination of this cause. Given these circumstances, the instant case is not a proper vehicle for the consideration of the issues the Petitioner would have this Court address.

Respectfully submitted,

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APPENDIX

Excerpts from Petitioner's Motion in Limine. 2a

Rule 1.110(d), Fla. Rules of Civ. Proc. 2a

Rule 1.140(h), Fla. Rules of Civ. Proc. 3a

Excerpts from Transcript of Testimony of John P. Ohl 3a

CONCLUDING PARAGRAPHS OF PETITIONER'S MOTION IN LIMINE SERVED MARCH 29, 1979:

"5. In accordance with case authority, the Respondent should not be permitted to introduce into evidence any of the docments which she took without the knowledge or consent of the Petitioner and which belong to the Petitioner in that such documentation was obtained improperly and unlawfully.

WHEREFORE, the Petitioner, JOHN P. OHL, respectfully moves this Court for an Order in Limine prohibiting the Respondent from introducing into evidence those files taken improperly and unlawfully by the Respondent without the Petitioner's permission or knowledge."

RULE 1.110(d), FLA. RULES OF CIV. PROC.:

(d) **Affirmative Defenses.** In pleading to a preceding pleading a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms if justice so requires, shall treat the pleading as if there had been a proper designation. Affirmative defenses appearing on the face of a prior pleading may be asserted as grounds for a motion or defense under Rule 1.140(b); provided this

shall not limit amendments under Rule 1.190 even if such ground is sustained.

RULE 1.140(h), FLA. RULES OF CIV. PROC.:

(h) Waiver of Defenses.

(1) A party waives all defenses and objections that he does not present either by motion under subdivisions (b), (e) or (f) of this rule or, if he has made no motion, in his responsive pleading except as provided in subdivision (h)(2).

(2) The defenses of failure to state a cause of action or a legal defense or to join an indispensable party may be raised by motion for judgment on the pleadings or at the trial on the merits in addition to being raised in either a motion under subdivision (b) or in the answer or reply. The defense of lack of jurisdiction of the subject matter may be raised at any time.

EXCERPTS FROM TESTIMONY OF JOHN P. OHL:

[190] BY MR. WEIDENBENNER:

Q. Mr. Ohl, we served, prior to today, we served a notice on your attorneys to produce at trial certain files of yours, to wit, file named J. P. Ohl Personal House, and a file named John P. Ohl Sands Point Property.

Have you brought those files with you?

A. Yes.

Q. May I ask you to compare this document to your files and see if that is similar to a copy in your files?

MR. BRAGG: Is that one of the files that Mrs. Ohl took from Mr. Ohl's files in the Sands Point home?

MR. WEIDENBENNER: Yes. It's from one of those files.

[191] THE WITNESS: Is that the file you are referring to?

MR. WEIDENBENNER: I don't know.

THE WITNESS: Well, you gave it to me.

MR. BRAGG: Your Honor, the hearing we had prior to trial, certain documents the Respondent requested that we produce, we wouldn't produce them, and subsequent discovery revealed that prior to trial, in some days prior to the filing of this lawsuit, Mrs. Ohl had taken files out of Mr. Ohl's files from the Sands Point home.

There was a question—or not—well, anyway, that is my objection or explanation.

THE WITNESS: Well, there's—what was handed to me is a Xerox. There appears to be a ribbon copy in my files. I say my files. And I would have no doubt that the contents was prepared by an associate of mine, Francis A. Fullam, Jr., and delivered to me.

It has to do with the closing of the title on Number 10 Birch Hill Road. It appears in the file which was stolen from me and delivered to me after the subpoenas to produce the information, which you already had in your possession.

MR. WEIDENBENNER: Your Honor, I would like to submit that as Respondent's next Exhibit.

MR. BRAGG: I would object on the grounds the document, the proper predicate has not been laid to [192] introduce that document into evidence. And because of the fact that it came from a file of Mr. Ohl's that was taken by Mrs. Ohl from Mr. Ohl, and pursuant to the case of Markham vs. Markham, 272 2d 813, I believe that the evidence, document is not admissible. It is a result of a wrongful act of the respondent. It's a product of the wrongful act of the respondent and, therefore, regardless of what the document says or purports to say, is inadmissible.

THE COURT: What is that?

MR. BRAGG: 272 So2d 813. That involved a situation in a domestic case where the husband—

THE COURT: Is that the wiretap?

MR. BRAGG: Yes, sir.

THE COURT: I am familiar with that case. I don't think that is applicable to the facts here.

I thought you had something new that you were going to tell me.

I have read the document over and it indicates that he was present at the time of the closing and it's a report of the closing of the Birch Hill property. I think it's relevant and material.

I don't think the Court could sustain the objection. It did come from the file, whether it was taken surreptitiously from his home at Sands Point or not. [193] He got it back. I think it may be relevant, so I will overrule the objection.

MR. WEIDENBENNER: I will add, it was taken from the marital residence.

I further move to strike Mr. Ohl's last statement as to—

THE COURT: I can understand somewhat his consternation at being subpoenaed to produce something when she already had them. It is not truly unusual in a domestic case, but I will strike it from the record because I didn't intend to consider that portion of his answer anyway, so let's proceed.

This will be Respondent's Exhibit 23.

(Thereupon, the document referred to was marked and received Respondent's Exhibit Number 23 in evidence.)

[200] THE COURT: Any objection?

MR. BRAGG: Your Honor, I don't think they are relevant or material to anything.

Assuming they are, that is thirty, twenty, twenty-five, thirty, thirty-five years ago. If there is any relevance today to any of the issues that we have in this particular lawsuit—

THE COURT: It may go to show the relationship between the parties and the relationship between Mr. Ohl and his wife's parents.

There is a check in there that may bear on the money put—

MR. WEIDENBENNER: Purchase of the residence.

THE COURT: That may bear on the down payment for the purchase of the Birch Hill home, so I will overrule it.

Exhibit 3 is now received in evidence over objection as Respondent's Exhibit 3.

(Thereupon, the documents referred to were received Respondent's Exhibit Number 3 in evidence.)

THE COURT: All right. Let's proceed.

[201] Q. And did virtually all the proceeds from the sale of that house go into the Sands Point home?

A. That is correct.

Q. Can you identify that document for me?

A. Well, again, this is a Xerox of a document not signed and the typed signature of Ralph O. Winger, who worked for me, is now a partner, or was, of mine.

I don't want to create problems, but I would like to know where it comes from because I can't identify it. It's a Xerox copy, it's not an original.

Q. Do you have your file there that we requested to produce, that you can compare it to your file?

A. I have whatever you gave me. And undoubtedly if you have these, you can help me by finding it, if it's here.

Q. There is another file, it may be in the Sands Point file, too.

A. I don't want to take up too much time. If you can let me just glance through it, I will tell you whether the substance of it is right, because I have enough recollection of buying and selling this. This is the sale of it. It's not dated. This is what is throwing me.

Do you know—it's not dated. I'm guessing it's in December. 1950. It says, 10:15 a.m. But I don't have a date.

But I would say yes, the substance is accurate. I [202] have no objection to it.

MR. WEIDENBENNER: I would like to have that admitted as Respondent's next Exhibit.

MR. BRAGG: No objection.

THE COURT: Receive it without objection as Respondent's Exhibit 24.

(Thereupon, the document referred to was marked and received Respondent's Exhibit Number 24 in evidence.)

BY MR. WEIDENBENNER:

Q. Mr. Ohl, there are three documents here, all relating to the purchase of the Sands Point property.

I would like to see if you can identify those for me.

A. Yes, I can identify the first one, which is dated October 4, 1950, which I spend a lot of time trying to find and couldn't find because it was in a file that was stolen. I can identify it now, having been put before me.

The contract, the assignment of the contract of sale on the 10 Brich Hill Road is a Xerox copy, and my signature, and I can identify that as a copy.

The third document is a memorandum of closing date, October 17, 1950. I am recorded as present. It's a Xerox copy, again typed signature of Ralph O. Winger, not an original, but I am willing to say it's accurate.

[203] MR. WEIDENBENNER: I would like to have these admitted as Respondent's next Exhibit.

MR. BRAGG: No objection.

THE COURT: I will receive that as Respondent's Exhibit 25 without objection.

(Thereupon, the documents referred to were marked and received Respondent's Exhibit Number 25 in evidence.)

THE COURT: Do you want these as a composite?

MR. WEIDENBENNER: Yes, sir.

THE COURT: All three documents. All right.

MR. WEIDENBENNER: They all relate to the purchase of the Sands Point property.

[207] indicates to me that I was making a calculation of things to be — what their value was and what the tax burden would be if they were sold.

And I have a number at the bottom showing the burden of $5,000 of taxes, so I don't think it would have — it is not dated, so I can't tell you what relevance it has to dates.

And the second one, however, is in my handwriting and would be in round numbers, because it corroborates what is in my black book, were it possible for me to come up with money to buy this.

Q. With the words "value, profit and tax" shown clearly on the top of that document, does it clearly conform with this document?

A. Yes. But it has no date.

MR. WEIDENBENNER: Your Honor, now I will offer these.

THE COURT: You have seen them?

MR. BRAGG: Yes. I object on the ground of relevancy and materiality. I don't know what they are. Are they work papers or whatever? I don't think they have any relevancy or materiality.

MR. WEIDENBENNER: He already testified it was his papers where he was trying to figure out where he could come up with the funds.

[208] THE COURT: There is a reference here that says, house, 10 Birch Hill. I think it's relevant. I will overrule the objection.

Do you want this as a single Exhibit?

MR. WEIDENBENNER: Yes. That can go as a single Exhibit.

THE COURT: That will be Exhibit 26, over objection.

(Thereupon, the document referred to was marked and received Respondent's Exhibit Number 26 in evidence.)

[246] A. I am not referring. It was stolen from my house and I have no way of knowing, without the minute book. It's been taken. It is not signed by me. It's a typewritten Xerox copy from the contents. I believe it to be accurate.

MR. WEIDENBENNER: I would like to have this admitted into evidence.

MR. BRAGG: I don't have objection.

THE COURT: Respondent's Exhibit 32 received without objection.

(Thereupon, the document referred to was marked and received Respondent's Exhibit Number 32 in evidence.)

BY MR. WEIDENBENNER:

Q. Mr. Ohl, these items of personal property which are shown on the appraisal, would it be correct to say that those items were acquired during the course of your marriage?

A. Since we were married in '32 and the date of that, to date we are not divorced, the answer is yes.